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No. 95-1571

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RODERICK TURNER and PAUL SCHROEDER,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court properly employed the test of *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine that Petitioners' asset forfeitures could not have been punishment for the same offenses for which Petitioners stand criminally charged.

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

THE ILLINOIS SUPREME COURT PROPERLY EMPLOYED THE TEST OF BLOCKBURGER v. UNITED STATES, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), TO DETERMINE THAT PETITIONERS' ASSET FORFEITURES COULD NOT HAVE BEEN PUNISHMENT FOR THE SAME OFFENSES FOR WHICH PETITIONERS STAND CRIMINALLY CHARGED.

The Petitioners fault the Illinois Supreme Court for its analysis under *Blockburger* v. *United States*, 284 U.S. 299, 57 S.Ct. 180, 76 L.Ed. 309 (1932), asserting as follows:

> The issue is not whether the forfeiture was an element of the criminal offenses charged against each Petitioner but whether forfeiture of Petitioners' U.S. Currency was a prior punishment for the same criminal offenses. Fines and imprisonment are not elements of criminal offenses, but they are punishment for the offense. (Petition, page 20).

Assuming, *arguendo*, that Petitioners are correct in how they formulate the *Blockburger* inquiry, they are manifestly incorrect in their conclusion that the forfeitures which were ordered were premised on the same offenses with which they are charged criminally, in Schroeder's case, unlawful possession of cannabis, and unlawful possession of cannabis with intent to deliver, and in Turner's case, unlawful possession of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a controlled substance without a tax stamp.

The criminal charges against the petitioners alleged their then current possession of cannabis or cocaine. But the forfeitures of petitioners' money could not have been based on that (current) possession. Consideration of the

statutes under which Respondent sought, and obtained, forfeiture of these Petitioners' money is essential at this point. In Turner's case, the money was forfeited pursuant to 720 ILCS 570/505(a)(5), which renders forfeitable:

> everything of value furnished, or intended to be furnished, in exchange for a substance in violation of this Act, all proceeds traceable to such an exchange, and all moneys, negotiable instruments and securities used, or intended to be used, to commit or in any manner to facilitate any violation of this Act.

In Schroeder's case, the money was forfeited pursuant to *Ill.Rev.Stat.*1991, ch. 56½, par. 712(a)(5)[1], which deemed subject to forfeiture:

> everything of value furnished or intended to be furnished by any person in exchange for a substance in violation of this Act, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to commit or in any manner facilitate any felony violation of this Act.

The provisions are identical, except that one concerns offenses under Illinois' Cannabis Control Act, and limits forfeitures to felony violations of that Act, whereas the other concerns offenses under Illinois' Controlled Substance Act.

As applicable here, these provisions allow forfeiture only for past or intended future violations of either Act, and not for a current possession of either cannabis or a controlled substance. This is evident from the very tenses

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[1] Illinois recompiled its statutory scheme after Schroeder's forfeiture action, and the cannabis-related forfeiture provision is now found at 720 ILCS 550/12(a)(5).

of the verbs used in the various clauses. Of necessity, those verbs speak to past criminal violations, or intended future violations of the Acts, and not to present possessory offenses. As to a present possessory offense, the government hardly could prove that the seized money was furnished in exchange for the very substance adjacent to which it had been found; had the money been so furnished, the money would have been spent, and would not be in the position in which it was found. Similarly, if the money were intended to be furnished in exchange for a substance in violation of the Acts, the substance intended to be acquired would not yet have been obtained, and the substance found adjacent to the money could not be the predicate for the forfeiture. Finally, "proceeds traceable to such an exchange" necessarily connotes that the exchange occurred in the past, such that the contraband no longer would be present.

The Illinois Supreme Court aptly made this point in its decision, regarding Petitioner Turner, as follows:

> Moreover, we note that there is no factual link between the cash as proceeds of a drug transaction and the criminal offenses. The cash was seized during the execution of a search that resulted in the seizure of cocaine which, in turn, was the basis for the above charges being brought against Turner. The cash could not have been traced to the proceeds of any sale of the cocaine found in the indictment since defendant is charged with possession of that cocaine, which had not yet been sold. *In re P.S.*, 169 Ill.2d 260, 661 N.E.2d 329, 214 Ill.Dec. 475, 483 (1996).

The same analysis is equally applicable to the case involving Petitioner Schroeder.

Further, contrary to Petitioners' assertion at page 22 of their petition, Respondent did indeed allege in the

trial court that each Petitioner's money was forfeitable because each Petitioner may have committed other unspecified illegal drug transactions. Respondent's complaints for forfeiture in these cases specifically invoked the above-quoted statutes to justify forfeitures of the Petitioners' money (R.T. SC 3-4; P.S. C 2-4, 7-9[2]), and, as just discussed, those statutes necessarily speak to past or intended future violations of the Acts within which they are found.

Petitioners make various arguments in their petition concerning the following statutory presumption in Illinois' Drug Asset Forfeiture Procedure Act, which was alleged in both forfeiture complaints and discussed in the Illinois Supreme Court's decision:

> The following situations shall give rise to a presumption that the property described therein was furnished or intended to be furnished in exchange for a substance in violation of the Illinois Controlled Substances Act or the Cannabis Control Act, or is the proceeds of such an exchange, and therefore forfeitable under this Act, such presumptions being rebuttable by a preponderance of the evidence:
>
> (1) All moneys, coin, or currency found in close proximity to forfeitable substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of substances. 725 ILCS 150/7(1).

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[2] Actually, in the complaint for forfeiture of Schroeder's cash, the State mistakenly cited *Ill.Rev.Stat.*1989, ch. 56½, par. 1505, which was the provision in the Controlled Substances Act, and not the Cannabis Control Act. But such fact is of no moment since in all aspects relevant here the two Acts are essentially identical.

As is evident, the presumption established in this provision mirrors nearly perfectly the above-cited forfeiture provisions under which Respondent achieved forfeiture of Petitioners' money.

Petitioners first claim that their currency could not be forfeited on the presumption that they may have committed some other unspecified drug transaction at some unknown time and place. They assert that if the State could do so, the State could forfeit currency of innocent persons at any time. Without explanation, they cite *United States* v. *United States Coin and Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971), for this proposition. Respondent is at a loss to understand the relevance of that case to the claim made by Petitioners.

The Petitioners' concerns for the rights of innocent owners are addressed by the statute itself. First, the presumption on its face allows for its rebuttal, and the presumption has been interpreted by Illinois courts not to undermine the government's ultimate burden of proof to sustain a forfeiture. *In re $53,263.00*, 159 Ill.App.3d 114, 512 N.E.2d 740, 111 Ill.Dec. 351 (1st Dist. 1987). Additionally, Illinois' Drug Asset Forfeiture Procedure Act provides a number of exemptions from forfeiture, including one for innocent owners of assets seized. 725 ILCS 150/8(a). Thus, had these forfeitures been based solely on the presumption, they still would be valid.

Petitioners next assert that their money was forfeited based solely on the presumption regarding its proximity to forfeitable substances in their residences "and not because Petitioners, or either of them, may have committed unspecified illegal drug transactions." (Petition, page 22). While Respondent may have sought the forfeitures of Petitioners' money by asserting the statutory presump-

tion regarding money found in close proximity to contraband, it by no means can be said that Respondent obtained the forfeitures by operation of the presumption.

First, notwithstanding that Petitioners were the movants in the trial court and the appellants in the earlier appeals to the Illinois Appellate Court, they never brought to those courts or to the Illinois Supreme Court the actual transcripts of the circuit court forfeiture proceedings which might have proved definitively the basis of the forfeitures.[3] Respondent must note here the possibly misleading nature of one sentence in the Illinois Supreme Court's decision. In discussing Turner's case, that court stated, "In making the determination that the cash was subject to forfeiture, the trial judge stated that the cash was the product of illegal activity." *In re P.S.*, 214 Ill.Dec. at 483. While *a* trial judge did say that the forfeiture was the product of illegal activity (R.T. R. 12), it was the judge who presided over Turner's motion to dismiss his criminal charges, in interpreting the earlier forfeiture, and not the judge who presided over the forfeiture proceeding itself.

More importantly, from the records which actually were before the Illinois reviewing courts the almost ines-

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[3] As appellee in the Appellate Court, Respondent did not assert a default for such failures by Petitioners. This was because, instead of employing a *Blockburger* analysis, Respondent, both there and in the Illinois Supreme Court, took the more global position that the double jeopardy clause is not implicated by a prior forfeiture. The Illinois Supreme Court addressed that argument in its decision only with respect to a third defendant, John Kimery, and rejected the position of the State of Illinois. The petition for a writ of *certiorari* from that part of the decision is pending before this Court in *Illinois* v. *Kimery*, 95-1436.

capable inference is that the forfeitures of Petitioners' money were not premised on the statutory presumption, but on other evidence which showed that the money in question was the proceeds of earlier transactions in contraband.

In its written memorandum in support of its response to Turner's motion to dismiss the criminal charges, Respondent specifically alluded to the fact that, at Turner's earlier forfeiture proceeding, the following testimony was given but unrefuted by Turner:

> Det. Fields also testified that Roderick Turner gave a taped statement in which he admitted that he had been selling cocaine for five years and that the quantity of cocaine found (3 ounces) during the search represented a 2 days supply. Field's [*sic*] also testified that Turner accepted an estimate that Turner made about a $1,000.00 per week profit from his drug sales based on the quantities he was selling. (R.T., C. 46).

That testimony makes clear that the forfeiture of Turner's money must not have been based on the statutory presumption arising from its proximity to the contraband found in his premises.

The record brought by Petitioner Schroeder suggests that similar proof must have been forthcoming in his case. The pleadings in his forfeiture action include: a written allegation by Schroeder that the currency in question "was acquired through legal means" and was therefore "not subject to forfeiture" (P.S., C. 16-17); pleadings by Respondent State of Illinois seeking to compel Schroeder's answers to civil interrogatories and his production of tax returns and other financial documentation, all clearly designed to ascertain the legitimate sources of income which the minor child might have had,

(P.S. C. 24-27, 43 et seq.); and orders that Schroeder answer certain of the questions from the interrogatories. (P.S. C. 30, 48). Finally, a minute order indicates that a trial was held with five witnesses testifying (P.S. C. 49), and the written order of forfeiture indicates that the seized $1,627.22 was forfeited pursuant to Section 712(a)(5) of the Cannabis Control Act, a different provision than the one setting forth the statutory presumption. (P.S. C. 49-50). It is inferable that at the forfeiture hearing it was shown that this minor child had no legal means to have possessed the $1,627.22 which was seized. Moreover, as to Schroeder, even if the statutory proximity presumption were used, it could be used independent of considering the cannabis, itself, since the statute allows the presumption for the proximity of cash to forfeitable drug manufacturing or distributing paraphernalia, and the record demonstrates that, in addition to cannabis, such paraphernalia was found in proximity to Schroeder's cash. (P.S. C. 3, 7-9).

Respondent acknowledges that in these cases the Petitioners' possession of contraband cannabis or cocaine triggered the forfeiture actions. However, as shown, the forfeitures did not rest on those acts of possession, and the relevant statutes do not require current acts of possession to justify forfeitures.

Against this background, it is obvious that there is no merit in Petitioners' claim that they were denied the opportunity in the trial court to defend against forfeitures premised on other, unspecified illegal transactions. Since the complaints for forfeiture in Petitioners' cases recited the statutory language, and that language clearly refers to either prior or intended future transactions, Petitioners certainly were on notice of the basis on which

Respondent sought the forfeitures. Petitioners therefore were in the position to respond to it in the trial court, and apparently never claimed there that the claimed bases for the forfeitures were too vague to defend against. Indeed, the above-quoted written claim by Schroeder, that the cash seized at his house "was acquired through legal means," appears to be precisely a response regarding his past acquisition of the money in question.

There also is no merit in Petitioners' claim that the Illinois Supreme Court acted *sua sponte* in determining the bases of the forfeitures. *Amicus curiae* actively promoted the argument before the Illinois Supreme Court, and the Petitioners had, and took, the opportunity to respond to the argument in their brief before that court. In its decision, the Illinois Supreme Court simply responded to an argument presented to it. It did not act *sua sponte*.

Further, in light of the response which Petitioners offered to the argument by *amicus*, they cannot now be heard to claim that the Illinois Supreme Court failed to consider, or violated, their purported constitutional rights to be informed of the nature and cause of the accusations supporting the forfeitures. In that court, Petitioners never made the argument which they posit here, though it would have been logical to do so, since it is simply a response to the argument made by *amicus*.

Rather, they first argued that Respondent had brought an insufficient record to show that the forfeiture actions were premised on the money having been proceeds, an ironic claim since Petitioners had been the movants for dismissal in the trial court and the appellants in the Appellate Court, and therefore bore the burden to bring

records demonstrating their entitlement to relief in those courts. *People* v. *Munday*, 134 Ill.App.3d 971, 481 N.E.2d 338, 89 Ill.Dec. 787 (2nd Dist. 1985); *People* v. *Edwards*, 74 Ill.2d 1, 383 N.E.2d 944, 23 Ill.Dec. 73 (1978).

Next, they argued that, by not raising the claim in the trial or appellate courts, Respondent had waived the claim that the money had been proceeds of earlier transactions, an argument which the court chose to reject, (*In re P.S.*, 214 Ill.Dec. at 482), and one which does not square with how the forfeiture trials apparently were litigated.

Finally, in response to the position of *amicus* that Petitioners' money may have been proceeds of earlier transactions, and that the forfeiture of proceeds from illegal acts is remedial in nature, Petitioners simply asserted that *Austin* v. *United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) "precludes the court from examining the nature of the particular proceeds forfeited." In their brief, Petitioners never voiced any concern for the notice which they now seek. Nor did they seek rehearing, pursuant to Supreme Court Rule 367, a glaring omission if they truly believed, as they now assert, that their rights were violated solely as a result of the Illinois Supreme Court's decision. See, *People* v. *Baker*, 85 Ill. App.3d 661, 406 N.E.2d 1152, 40 Ill.Dec. 785, 788 (2nd Dist. 1980).

Respondent questions Petitioners' notice claim in any event. Although their petition is hardly clear on the point, Petitioners appear to assert that if a forfeiture may be premised on a property owner's prior illegal acts, the property owner is entitled to specific notice of those acts, as if he were being prosecuted criminally for them.

They cite no authority directly supporting such a claim. Even assuming that such prior criminal acts are the purported basis for a forfeiture, the property owner in no manner is "charged" with such acts in a forfeiture proceeding, such that the forfeiture proceeding itself becomes tantamount to a criminal trial. Petitioners' citation of a footnote from *Austin* v. *United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), for the proposition that the dual nature of forfeiture proceedings has resulted in confusion as to what Constitutional principles apply, appears to be an admission that such is not necessarily the law. Further, the forfeiture provisions in Illinois' Controlled Substance and Cannabis Control Acts do not even require proof of prior criminal acts to justify forfeiture.

Given the record, and Petitioners' concession that one of their claims is raised for the first time before this Court, Turner's and Schroeder's petition, standing alone, might appear inappropriate for the grant of a writ of *certiorari*. But it is most difficult to view their petition standing alone. In deciding these Petitioners' cases under *Blockburger*, the Illinois Supreme Court essentially assumed the double jeopardy clause to be implicated by prior *in rem* asset forfeitures, when there is no precedent from this Court so holding. Yet it is in the very same opinion that the Illinois Supreme Court expressed its rationale for making that assumption, albeit regarding a third defendant. That portion of the Illinois Supreme Court's decision already is pending before this Court in *Illinois* v. *Kimery*, No. 95-1436. Viewed together, the three cases cry out for review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that a Writ of Certiorari be denied to review the decision of the Supreme Court of the State of Illinois. Alternatively, Respondent requests that Writs of Certiorari be granted to review the entirety of the decision of the Supreme Court of Illinois, i.e., including the petition in *Illinois* v. *Kimery*, No. 95-1436.

Respectfully submitted,

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